WONG CHUN WAH

v.

KOK KAM CHEE

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
LOW HOP BING JCA
HASAN LAH JCA
[CIVIL APPEAL NO: W-02-627-99]
7 APRIL 2008

TRUSTS: *Equity and trusts - Transfer of property and money - Trust deed - Enforcement of trust - Breach of promise of marriage - Maxims of equity*

CONTRACT: *Marriage - Breach of promise - Damages - Trust deed - Enforcement of trust - Maxims of equity*

FAMILY LAW: *Marriage - Breach of promise to marry - Damages - Trust deed - Enforcement of trust - Maxims of equity*

EQUITY: *Maxims of equity - He who seeks equity must do equity - He who comes into equity must come with clean hands - Whether conformed with*

This was an appeal by the plaintiff against the decision of the High Court dismissing his claim against the defendant and allowing the defendant's counterclaim. The plaintiff's claim, based on a trust deed executed by the defendant in favour of the plaintiff, prayed for the transfer, by the defendant to one Amity Evergreen Sdn Bhd, of certain property, and the transfer, by the defendant to the plaintiff, of the sum of RM50,000 held in a fixed deposit account. The defendant's counterclaim was for damages based on the plaintiff's breach of promise to marry the defendant and a declaration that the trust deed was null and void. On a balance of probabilities, the trial judge found for the defendant on the ground, *inter alia*, that the plaintiff was in breach of the promise of marriage, for which the defendant was also additionally awarded a sum of RM5,000 as damages. For the purpose of this appeal, the question for determination was whether the plaintiff was entitled to enforce the trust against the defendant when he had breached the promise of marriage which he had made to the defendant.

Held (dismissing the appeal)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The plaintiff's attempt in enforcing the trust involved invoking the aid of equity in the court exercising Chancery jurisdiction. In this regard, two maxims of equity stood out significantly: (i) he who seeks equity must do equity; and (ii) he who comes into equity must come with clean hands. Applying the first maxim, the plaintiff who was seeking the equitable relief of enforcing the trust must do equity which, in popular parlance, meant being right and fair to the defendant. The second maxim, related to the *ex turpi causa non oritur actio* of the common law, is very similar to the first maxim except that it looks to the past rather than the future. The plaintiff, as the claimant, not only must be prepared to do what was right and fair but also must show that his past record in the transaction was clean. Applying the judicial pronouncement in *Eastern Properties Sdn Bhd v. Hampstead Corporation Sdn Bhd* to the factual matrix of the instant appeal and having regard to the standard of a reasonable man, the plaintiff's breach of promise of marriage clearly showed that he had not acted fairly to the defendant. It also revealed that the plaintiff had not acted with clean hands. To succeed in the enforcement of trust, the plaintiff had to conform to the above maxims of equity; otherwise, he was disentitled to enlist the aid of equity. On the facts, the enforcement of trust by the court would obviously bring about a condonation of the plaintiff's breach of promise of marriage and result in a situation that wholly offended the aforesaid maxims of equity. As the plaintiff's conduct ran counter to "equity" in its popular sense of being right and fair, and he had not come into equity with clean hands, he was not entitled to seek equitable remedy for the purpose of enforcing the trust. The trial judge's specific finding of facts was also supported by, and consistent with, the evidence adduced before him. There was no misdirection when he dismissed the plaintiff's claim and he was also correct in allowing the defendant's counterclaim. So there was no room for appellate interference. Thus, the answer to the above question was in the negative. (paras 20, 21, 22, 23, 24, 26, 27, 28, 29 & 30)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan plaintif terhadap keputusan Mahkamah Tinggi kerana menolak tuntutannya terhadap defendan dan membenarkan tuntutan balas defendan. Tuntutan plaintif, yang diasas kepada satu suratikatan amanah yang dimeterai oleh defendan untuk manfaat plaintif, menuntut supaya defendan menyerahkan harta-harta tertentu kepada sebuah syarikat, Amity Evergreen Sdn Bhd, serta menyerahkan wang berjumlah RM50,000 yang disimpan di dalam satu akaun deposit tetap kepada plaintif. Tuntutan balas defendan adalah untuk gantirugi atas kemungkiran janji plaintif untuk mengahwininya dan deklarasi bahawa suratikatan amanah adalah tak sah dan batal. Atas imbangan kebarangkalian, hakim bicara memutuskan untuk defendan, antara lain berdasarkan alasan bahawa plaintif telah memungkiri janjinya untuk mengahwini defendan, sekaligus mengawardkan tambahan gantirugi RM5,000 kepada defendan. Bagi maksud rayuan di sini, soalan yang menuntut jawapan adalah sama ada plaintif berhak untuk menguatkuasakan amanah terhadap defendan setelah memungkiri janjinya untuk mengahwini defendan.

Diputuskan (menolak rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Percubaan plaintif untuk menguatkuasakan amanah melibatkan penggunaan ekuiti oleh mahkamah yang melaksanakan bidangkuasa Chancery. Dalam hubungan ini, dua maksim ekuiti terserlah secara jelas, iaitu: (i) siapa yang menginginkan ekuiti harus melakukan ekuiti; dan (ii) siapa yang menuntut ekuiti hendaklah datang dengan tangan yang bersih. Menggunapakai maksim pertama, plaintif, yang hendak melaksanakan relif ekuiti penguatkuasaan amanah, hendaklah melakukan ekuiti yang, dalam bahasa popularnya, bermakna berlaku lurus dan adil kepada defendan. Maksim kedua, yang berkait dengan *ex turpi causa non oritur actio* dalam undang-undang common, amat menyerupai maksim pertama, kecuali bahawa ia melihat ke belakang dan tidak ke hadapan. Plaintif, selaku yang menuntut, bukan sahaja harus bersedia untuk melakukan apa yang betul dan adil tetapi juga mesti menunjukkan bahawa rekod terdahulunya dalam transaksi adalah bersih. Menggunapakai pengisytiharan kehakiman di dalam *Eastern Properties Sdn Bhd v. Hampstead Corporation Sdn Bhd* kepada gagasan fakta rayuan

ini dan mengambilkira standard orang munasabah, plaintif, dengan memungkiri janji untuk berkahwin dengan defendan, jelas tidak bertindak dengan tangan yang bersih. Untuk berjaya dalam penguatkuasaan amanah, plaintif perlu mematuhi kedua-dua maksim ekuiti di atas; jika tidak beliau tidak berhak untuk mendapatkan bantuan ekuiti. Di atas fakta, penguatkuasaan amanah oleh mahkamah bermakna bersekongkol dengan perbuatan mungkir janji plaintif untuk mengahwini defendan, sekaligus membangkitkan keadaan yang sama sekali bertentangan dengan maksim-maksim di atas. Oleh kerana kelakuan plaintif telah menyanggahi "ekuiti" dalam maksud popularnya untuk berlaku lurus dan adil, dan oleh kerana beliau tidak datang dengan tangan yang bersih, maka beliau tidak berhak untuk memperoleh remedi ekuiti untuk menguatkuasakan amanah. Dapatan fakta spesifik oleh yang arif hakim juga disokong oleh dan konsisten dengan keterangan-keterangan yang ada di hadapannya. Tidak wujud salah arahan bilamana beliau menolak tuntutan plaintif dan beliau juga betul dalam membenarkan tuntutan balas defendan. Oleh itu, tiada ruang untuk campurtangan peringkat rayuan. Sekaligus, jawapan kepada soalan di atas adalah dalam bentuk negatif.

Case(s) referred to:

Eastern Properties Sdn Bhd v. Hampstead Corporation Sdn Bhd [2007] 6 CLJ 538 CA ***(foll)***

Jones v. Lenthal [1669] 1 Ch Cas 154 ***(refd)***

Pathma Naganather & Anor v. Nivedita Naganather [2005] 4 CLJ 552 CA ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 2 CLJ 146 SC ***(refd)***

Other source(s) referred to:

Snell's Equity, Thomson Sweet & Maxwell 2004, p 96

For the appellant - Joseph Yeo; M/s Joseph Yeo
For the respondent - Lavendran; M/s Loke & Assoc

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S3-22-498-95]

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] This is the appellant's ("the plaintiff's") appeal against the decision of the High Court in dismissing his claim against the respondent ("the defendant") and in allowing the defendant's counterclaim, with costs.

Plaintiff's Claim

[2] The plaintiff's claim, based on a trust deed executed by the defendant on 16 February 1995 in favour of the plaintiff ("the trust deed"), prayed for the transfer, by the defendant to Amity Evergreen Sdn. Bhd, of the land held under H.S. (D) 76684, P.T. No. 12691 together with a double storey terrace house erected thereon ("the property"); the transfer, by the defendant to the plaintiff, of the sum of RM50,000 in the fixed deposit Account No. 4214262047346 at Kuala Lumpur Dang Wangi Malayan Banking Berhad ("the fixed deposit"); the refund by the defendant to the plaintiff of the sums of RM63,833.87 and S$23,374.91; damages; and costs.

Defendant's Counterclaim

[3] The defendant's counterclaim was for damages based on the plaintiff's breach of promise to marry the defendant, and a declaration that the trust deed is null and void, and costs.

Factual Background

[4] After a full trial, the High Court arrived at a specific finding of facts which I now narrate below.

[5] The plaintiff, a Singapore businessman, is married and has been blessed with three children.

[6] The plaintiff met the defendant, a Malaysian woman who worked as a karaoke singer in Singapore.

[7] Having developed a clandestine relationship with the defendant in 1994, the plaintiff asked the defendant to look for a house in Malaysia as the plaintiff had promised to marry the defendant as his wife.

[8] In 1995, the defendant succeeded in procuring a house which is the property. The plaintiff purchased it at a consideration of RM99,000. However, the defendant executed the sale and purchase agreement on 6 January 1995 as the purchaser.

[9] On 16 February 1995, in the name of the defendant, the plaintiff deposited a sum of RM50,000 in the fixed deposit account by way of housing loan security for the property.

[10] On the same date, the defendant executed the trust deed to the effect that the defendant was holding the property and the RM50,000 in trust for the plaintiff, and the defendant shall sign all relevant documents to effect the transfer of the property and the fixed deposit as directed by the plaintiff. The trust deed did not cover the other sums claimed by the plaintiff.

[11] The plaintiff and the defendant were staying together whenever the plaintiff visited Malaysia, and also while they were on holidays, at the plaintiff's expenses, in the People's Republic of China, Taiwan and Hong Kong. The plaintiff had introduced the defendant as his wife to his relatives while in the People's Republic of China.

[12] The plaintiff had also allowed the defendant to use his ATM card, besides asking her to attend to the renovation and air-conditioning for the property.

[13] When the defendant subsequently discovered that the plaintiff was already married and had his own family establishment, and so had refused to marry her, the relationship between the plaintiff and the defendant became acrimonious. A complete breakdown ensued.

[14] Consequently, the plaintiff commenced this claim and the defendant filed the counterclaim.

Enforcement Of Trust

[15] In essence, learned counsel Mr. Joseph Yeo submitted for the plaintiff that the plaintiff is entitled to enforce the trust contained in the trust deed, as the defendant was holding the property and the RM50,000 in trust for the plaintiff, as a result of which, the defendant is required to transfer the property and the RM50,000 as directed by the plaintiff.

[16] It was argued by defendant's learned counsel Mr. Lavendran that, *inter alia*, the property was purchased and the RM50,000 was deposited as gifts to the defendant in consideration of love and affection arising from the intended marriage which the plaintiff has promised the defendant. A

[17] On a balance of probabilities, the learned trial judge found for the defendant as set out earlier, on the ground, *inter alia*, that the plaintiff was in breach of the promise of marriage, for which the defendant was also additionally awarded a sum of RM5,000 as damages. B C

[18] Having considered the submissions of both the learned counsel and the specific finding of facts by the learned trial judge, it is clear to me that the plaintiff's claim revolves around the enforcement of the trust contained in the trust deed, while the defendant is resisting that enforcement. D

[19] For the purpose of this appeal, the question for determination is whether the plaintiff is entitled to enforce the trust against the defendant when he has breached the promise of marriage which he has made to the defendant. E

[20] In my view, the plaintiff's attempt in enforcing the trust involves invoking the aid of equity in the court exercising Chancery jurisdiction.

[21] In this regard, two maxims of equity stand out significantly. These maxims are: F

(1) He who seeks equity must do equity; and

(2) He who comes into equity must come with clean hands. G

[22] Applying the first maxim, the plaintiff who is now seeking the equitable relief of enforcing the trust must do equity which, in popular parlance, means being right and fair to the defendant (see eg. *Snell's Equity*, Thomson Sweet & Maxwell 2004 p. 96). H

[23] The second maxim is related to the *ex turpi causa non oritur* actio of the common law. It is very similar to the first maxim, except that the second maxim looks to the past rather than the future. The plaintiff, as the claimant, not only must be prepared now to do what is right and fair, but also must show that his past record in the transaction is clean; for "he who has committed Iniquity ... shall not have Equity": *Jones v. Lenthal* [1669] 1 Ch. Cas 154; and *Snell's Equity, supra*. I

[24] In *Eastern Properties Sdn. Bhd v. Hampstead Corporation Sdn. Bhd* [2007] 6 CLJ 538 CA, Gopal Sri Ram JCA, speaking for the Court of Appeal, in para 14 at p. 547 explained the applicability of equitable maxims with unrivalled clarity as follows:

> [14] It is beyond argument that equitable doctrines are not to be dealt with in a rigid fashion. They are by their very nature flexible and meant to be applied in such a fashion as produces a just result on the facts and circumstances of a given case. But there are certain basic threads that have been woven into the fabric of equitable doctrines through the pronouncements in the leading cases on the subject. One of these is that a supplicant who prays in aid equitable assistance must himself or herself be not guilty of equitable misconduct. This is sometimes put in the form of the maxim: He who comes to equity must come with clean hands. So a contract breaker cannot successfully invoke the remedy of specific performance.

[25] Hence, where the litigant therein ie Eastern Properties was not in a position to meet its obligation under the rescission agreement and was guilty of a failure to abide by the promise it had made, it would be contrary to all principles of equity to allow it to succeed.

[26] Applying the above judicial pronouncement to the factual matrix in the instant appeal and having regard to the standard of a reasonable man, I am of the view that the plaintiff's breach of promise of marriage clearly shows that the plaintiff has not acted rightly and fairly to the defendant. It also reveals that the plaintiff has not acted with clean hands.

[27] To succeed in the enforcement of trust, the plaintiff has to conform to the above maxims of equity, otherwise, he is disentitled to enlist the aid of equity. On the facts, the enforcement of trust by the court would obviously bring about a condonation of the plaintiff's breach of promise of marriage and result in a situation which wholly offends the aforesaid maxims of equity.

[28] As the plaintiff's conduct obviously runs counter to "equity" in its popular sense of being right and fair, and has not come into equity with clean hands, he is not entitled to seek equitable remedy for the purpose of enforcing the trust.

[29] The learned trial judge's specific finding of facts is also supported by and consistent with the evidence adduced before him. There was no misdirection when he dismissed the plaintiff's claim. He was also correct in allowing the defendant's counterclaim. So there is no room for appellate interference: see eg, *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn. Bhd* [1993] 2 CLJ 146 SC; and *Pathma Naganather & Anor v. Nivedita Naganather* [2005] 4 CLJ 552 CA.

Conclusion

[30] The answer to the above question is in the negative. The plaintiff's appeal is devoid of merits and is dismissed with costs. The orders of the High Court are hereby affirmed. Deposit to the respondent on account of taxed costs.

[31] My learned brothers, Mohd. Ghazali bin Hj. Mohd Yusoff, JCA and Hasan bin Lah, JCA have read this judgment in draft and have expressed their agreement with it to become the judgment of the court.